

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
ATLANTA BRANCH OFFICE  
DIVISION OF JUDGES

CONVENTION & SHOW SERVICES, INC.

and

Case 7–CA–48723

RON PACIOCCO, JR., an Individual

*Judith A. Champa, Esq., and Eric S. Cockrell, Esq.,*  
for the General Counsel.

*David J. Selwocki, Esq.,* for the Respondent.

DECISION

Statement of the Case

**MICHAEL A. MARCIONESE, Administrative Law Judge.** I heard this case in Detroit, Michigan, on November 17, 2005. <sup>1</sup> Ron Paciocco, Jr., an Individual, filed the charge on July 1, and amended it on August 24. On September 27, the complaint issued, based on the amended charge, alleging that Convention & Show Services, Inc., the Respondent, violated Sections 8(a)(1), (3) and (4) of the Act by discharging Paciocco on January 7 and/or refusing to recall him to work since that date because Paciocco engaged in union and other protected concerted activities and because Paciocco announced his intention to file an unfair labor practice charge with the Board. The Respondent filed its answer to the complaint on October 10, which it amended at the hearing, denying that it engaged in the alleged unfair labor practices and asserting several affirmative defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is an exposition contractor with an office and place of business in Detroit, Michigan. In conducting its business operations, the Respondent annually derives gross revenues in excess of \$500,000, and purchases and receives at its Detroit facility goods and materials valued in excess of \$50,000 directly from points outside the State of Michigan. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that

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<sup>1</sup> All dates are in 2005 unless otherwise indicated.

Local 299, International Brotherhood of Teamsters (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

The Respondent is a contractor that sets up and takes down exhibitors' booths for trade shows held at Detroit's Cobo Arena. Fred Tanari is the founder and president of the company and his son, Sam Tanari, is the Vice President. The Respondent hires Teamsters, Iron Workers, Stage Hands and Carpenters to do the work of building and taking down booths on a show-by-show basis. The International Auto Show, held each January, is the largest of the trade shows on which the Respondent works. According to Sam Tanari, the Respondent will employ as many as 1100 employees at the peak of its work on that show, including 240 Teamsters.<sup>2</sup> The Respondent's actions with respect to one of the Teamsters employed during the January 2005 Auto Show is the subject of this proceeding.

Most of the work for the Auto Show is done before it opens. The Respondent usually begins hiring employees in early November, with the number of employees steadily increasing until it hits its peak in late December. When the show is ready to open for the press and VIPs, the Respondent's employment level declines to a skeleton crew to handle any changes requested by Exhibitors during the run of the show. The show lasts about two weeks then the Respondent will hire on a large number of employees to take down the exhibits and move out the materials needed for the show. The move-out is not as long as the build-up, usually lasting about a week. According to Sam Tanari, the Respondent's work on the auto show is usually over by about February 1.

The Respondent is a union contractor with collective-bargaining agreements with four unions, one for each trade, including Teamsters Local 299. For many years, the Respondent left the hiring to the Union, which operated an exclusive hiring hall for work at Cobo Arena. Under this system, the Respondent would call the Union business agent when it needed employees, tell him how many and when and the business agent would select the individuals to work on the show. In 2003, a number of individuals filed unfair labor practice charges against the Union and several contractors working at Cobo Arena, including the Respondent, alleging that the operation of the hiring hall violated the Act. These charges were settled in February 2004, before the start of hiring for the 2005 auto show. There is no dispute that the settlement agreements drastically changed the way people got jobs at Cobo Arena.

Pursuant to the settlement agreement, the Respondent would now hire directly any employees needed to work on shows at Cobo Arena and the Union's hiring hall was to be operated on a non-exclusive basis for at least three years. The agreement also required the Respondent and the other charged employers to run help-wanted advertisements in several local newspapers for three years in order to solicit applicants to be hired outside the hiring hall process. The first auto show to which these terms applied was the 2005 show at issue in this proceeding.

Ron (Renato) Paciocco, Jr., the Charging Party, testified that he was first hired to work for the Respondent at the Detroit auto show in December 1997 and that he has worked every auto show for the Respondent since then. Paciocco acknowledged that he has always been considered a casual employee. Although performing work as a Teamster, Paciocco is not a

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<sup>2</sup> The next largest show for the Respondent is the Boat Show for which the Respondent will hire approximately 22 Teamsters at its peak.

member of the Union. According to Paciocco, in order to become a regular employee and receive a union card, a casual has to work 1000 hours within a year at Cobo Arena. Paciocco also testified that the Union maintained a seniority list and that casual employees had to work their way up the list in order to get into the Union. On cross-examination, Paciocco conceded  
 5 that he did not know whether the seniority list still existed after the settlement of the unfair labor practice charges. Nor did Paciocco know what effect, if any, the settlement had on the prior practice for becoming a union member and regular employee.

Payroll records introduced by the Respondent show that Paciocco's first date of  
 10 employment was in late December 1998. The Respondent's controller, Joan Marchennia, testified that the Respondent has no records of any earlier employment by Paciocco. These records do confirm Paciocco's testimony that he worked every auto show since 1998, although his hours did not steadily and consistently increase over the years. The duration of his employment and the hours he worked fluctuated from year to year. His earliest start date was  
 15 for the 2004 auto show when he started working during the first week of December 2003. Although he started earlier that year, and worked both the build-up and load-out periods, he did not work as many hours as he had the year before.<sup>3</sup>

Paciocco testified that he started work for the 2005 auto show on or about December 28,  
 20 2004. He was hired to work as a foreman, which meant that he led a crew of three, including himself. As foreman, he received the "hard card" each morning that specified his crews' work location for that day. He also served as a liaison between the exhibitor on whose booth the crew was working and the crew. He was essentially a working foreman since he spent the bulk of the day moving freight, driving the Hi-Lo and doing other tasks as needed for the particular exhibitor  
 25 to which his crew was assigned. This was the first year that Paciocco was assigned to work as a foreman on the auto show.

Paciocco's last day of work on the auto show was January 7. The Respondent's payroll records show that he worked 44 hours of regular time and 6 hours of overtime for this auto  
 30 show. The Respondent's records show that this is the lowest number of hours he has worked since the 2000 auto show. According to Paciocco, his last tenure of employment with the Respondent was without incident until his last day. There is no dispute that the Respondent, through Sam Tanari, made a conscious decision that day not to continue Paciocco's employment for the 2005 auto show. Whether the Respondent's action is characterized as a  
 35 termination or a failure to recall is immaterial, the effect is the same. The issue here is what motivated the Respondent's decision. There is no dispute that an incident occurred on January 7 involving Paciocco which led to the Respondent's decision. The testimony of the witnesses for the General Counsel and the Respondent regarding what happened is widely divergent and requires resolution of credibility.

Paciocco testified that the "hard card" he received that day was for a four-hour call. He and his crew, John Toth and Al Tone, finished their assignment about 11:00 am and returned to the Union's temporary office at the arena to check out.<sup>4</sup> Gacioch, the steward, handed Paciocco  
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<sup>3</sup> The Respondent's records show that, for the 2003 show, Paciocco worked 200 hours at the regular rate of pay, 212.5 hours of overtime and 11 hours at double-time. For the 2004 show, Paciocco worked 192 regular hours, 140.5 hours of overtime and 24.5 hours at double time.

<sup>4</sup> The Respondent has a permanent office at Cobo where its administrative staff work. There are also several cubicles that are constructed for the duration of the show that serve as  
 50 temporary offices, including one used by the Union's steward on the job, Douglas Gacioch

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and his crew their paychecks and told them they'd have to wait for Nichols to check out. Paciocco and his crew stepped outside of the office to wait for Nichols to return. According to Paciocco, he looked at his paycheck while waiting for Nichols and it appeared to him that it was short because it didn't include pay for time when he and his crew worked through lunch.

5 Paciocco went over to the Respondent's administrative office and asked the woman at the window about his paycheck. She told him he would have to take it up with the steward. Paciocco then went back to the Union's office and questioned Gacioch about it. Gacioch told him he would have to take it up with the Respondent. At this point, according to Paciocco, he felt that he was being "ping-ponged". He went back to the Respondent's office, where he saw  
10 Nichols talking to the woman at the window. Paciocco also noticed that Nichols had picked up another hard card. Paciocco followed Nichols back to the Union office with his crew to check out. He testified that, as he entered the office, he saw Nichols place the hard card he had just picked up face down on the desk. After Paciocco and his crew had checked out, Nichols told them to go home and wait for a call.<sup>5</sup> According to Paciocco, he asked Nichols "what about that  
15 card?", referring to the hard card lying face down on the desk. Nichols replied that he didn't have anything for them and to just wait by the phone, they would get a call. Paciocco and his crew then left the office.

Paciocco testified further that, after leaving the office, he told Toth and Tone that he  
20 wanted to wait around to see what happened when the next crew checked out. Toth and Tone then left the area. Paciocco testified that after the next crew checked out, he asked the foreman as he was leaving the office if he got the next hard card. When he said he had, Paciocco looked at it, gave it back to the foreman and went back into the office. According to Paciocco, he confronted Nichols about why he and his crew were not given the hard card since they had  
25 checked out first. Paciocco testified that Nichols responded: "I'm not going to send those guys home after only four f---g hours. I just brought them in today. It's their first day here." Paciocco replied, "What about us? We've been here for a number of years. We were entitled to get that card, you know, first to check in, first to get the next work."<sup>6</sup> According to Paciocco, Nichols became loud and derogatory. Paciocco admitted that he also became agitated and raised his  
30 voice. Paciocco claimed he could not recall everything that was said by him or Nichols because they were talking over one another. Paciocco testified that the conversation ended when he told Nichols that he was going to file a grievance with the Union and a complaint with the NLRB and walked out of the office. On cross-examination, Paciocco testified that Nichols responded to his threat to file a grievance and NLRB complaint, using a lot of "F words", but he could not recall  
35 precisely what he said. Paciocco also claimed that his threat was loud enough for Gacioch, who was still in the office, to hear.

Paciocco testified that after he left the office, he remembered that he still had an issue with his paycheck so he went back to the Respondent's office to inquire about that. Paciocco  
40 told the woman at the window that the steward told him he had to speak to her about it. According to Paciocco, she responded, "kind of disgusted", and began going through some files looking for the hard card for the day in question. Paciocco admitted getting frustrated when the woman in the office couldn't find the hard card. He said he was going to file a complaint with the

45 (a/k/a "Dick Shooter") and the Respondent's General Foreman, George Nichols. The Respondent has admitted that Nichols is a statutory supervisor and agent of the Respondent.

<sup>5</sup> Paciocco could not recall whether Nichols told him that Union business agent Kenny Kwapisz, or the Respondent's employee Bobby Whiting would be the one who would call him to come to work.

50 <sup>6</sup> Paciocco testified that the practice had been, as long as he had worked the auto show, that the hard cards were handed out on a first-in, first-out basis.

“wage detail for the State of Michigan” and walked off.

Paciocco testified further that, after leaving Cobo, he went to the Union office to file a grievance. Paciocco met with Business Agent Kwapisz. Paciocco told Kwapisz what had happened with the hard card and said he wanted to file a grievance. According to Paciocco, Kwapisz tried to rationalize what had happened but Paciocco insisted on filing a grievance. Kwapisz then made two phone calls in Paciocco’s presence, one to Cobo and the other to the Union’s lawyer. After speaking to the lawyer, Kwapisz told Paciocco that, “under the National Freight Agreement”, he could not file a grievance because he was not a union member, he did not pay dues. When Paciocco responded that he did pay dues to work at Cobo, Kwapisz responded that was not dues but a “service fee”. Although Paciocco claimed he kept insisting that he wanted to file a grievance, Kwapisz would not even give him a grievance form.<sup>7</sup> Paciocco left the Union office and went home. Notwithstanding Paciocco’s threat to do so, he apparently did not go to the NLRB office at that time.

Paciocco recalled that he also made a phone call to the Union’s office at Cobo after meeting with Kwapisz. He could not recall whether it was the same day, the next day, or the following Monday.<sup>8</sup> Paciocco also was unable to recall if he made this call before or after he spoke to his fellow crew members and learned that they had been called into work. According to Paciocco, the steward, Gacioch, answered the phone. Paciocco asked if he could speak to Nichols. When Nichols got on the phone, Paciocco asked if he was coming back to work. Nichols replied that he didn’t know. At that point, Sam Tanari, who was in the office, got on the phone and told Paciocco that he wouldn’t be coming back to work. When Paciocco asked why, Tanari said it was because he “was causing too many problems.” Paciocco then asked if he was fired. Tanari replied, “you’re not coming back.” According to Paciocco, he has had no further communication with the Respondent. On cross-examination, he specifically denied calling the Respondent’s office at Cobo on January 7 and leaving a message for Tanari to call him or he would file a grievance.

Although Paciocco claimed that he threatened Nichols on January 7 that he would file a complaint with the NLRB over not getting the next hard card, he did not pursue any unfair labor practice charges until July 1, almost six months later. That charge only alleged a violation of Section 8(a)(1) and (3) based on the Respondent’s discharge of Paciocco “in retaliation for employee’s exercise of rights to file a union complaint.” It was not until August 24, when he amended the charge, that Paciocco first alleged specifically that his discharge violated Section 8(a)(1) and (4) because he had threatened to file charges with the Board. Paciocco explained that he prepared the initial charge himself, using a form he downloaded from the internet, but the amended charge was prepared by a Board agent.

The General Counsel also called John Toth, who was on Paciocco’s crew, to testify regarding the events of January 7.<sup>9</sup> Toth has been a member of the Union since 1978 and has worked for the Respondent as a casual on every auto show since 1997. For the 2005 show, he was assigned to Paciocco’s crew. Toth did not know Paciocco before working with him on the 2005 show. Toth testified that, on January 7, his crew did not work a full day. He recalled that they finished their assignment in about 5-6 hours and returned to the check-out booth. After

<sup>7</sup> Although there is evidence in the record that Paciocco filed an unfair labor practice charge against the Union related to the instant charge, there is no allegation in the complaint alleging that the Union violated the Act in its dealings with Paciocco.

<sup>8</sup> January 7 was a Friday.

<sup>9</sup> Al Tone, the other crew member, was not called as a witness.

turning in their hard card, Nichols told them he had no more work for them that day and to go home, “we’ll call you.” After checking out, Toth hung around the hall, talking to friends who worked there for a little while, and then went home. He did not corroborate much of Paciocco’s testimony. Specifically, Toth did not testify regarding there being any issue with their paychecks even though Paciocco testified that the whole crew had been shorted and despite the fact that, in Paciocco’s version of the events, Toth and Tone were present when he first noticed the shortage and tried to resolve it. Nor did Toth testify about the new “hard card” that Paciocco recalled seeing Nichols pick up while the crew was waiting to check out. Paciocco had indicated in his testimony that the crew was standing together outside the office when Nichols returned with the hard card in his hand and that the crew went into the office to check out when Nichols placed the card on the desk. Significantly, Toth did not corroborate Paciocco’s testimony that he told Toth and Tone that he wanted to hang around to see what happened when the next crew checked out. Finally, the General Counsel did not ask Toth any questions about the purported practice described by Paciocco of the first crew to check in getting the next available hard card.

Nichols and Gacioch, who testified for the Respondent, contradicted Paciocco’s version of the events of January 7. According to Gacioch, who has been the steward at Cobo for the last two years, he had a discussion with Paciocco on January 7 regarding an issue about a paid lunch. Gacioch recalled that Paciocco claimed he worked through lunch and didn’t get paid for it. Gacioch told him, “we don’t work through lunch, you need approval before doing it.” Gacioch explained that under the collective bargaining agreement, lunch time would be paid at premium rates if it was worked, so “you just don’t do it.” Gacioch testified that this is the only conversation he had with Paciocco that day. Gacioch did recall seeing Paciocco at the window talking to Christy Michelin, one of the Respondent’s office employees, and observed that he appeared irritated and was motioning. Gacioch conceded that what he observed Paciocco doing was “nothing dramatic” or “extremely out of the ordinary” and that he had seen worse. Gacioch testified that he may have approached the window and explained again about the lunch issue but he was not certain about this. Gacioch specifically denied hearing Paciocco mention anything about filing a grievance or NLRB charge during his discussion over the pay issue. He also denied hearing Paciocco mention these things in any conversation with Nichols, with whom Gacioch shared the office.

Nichols, the Respondent’s General Foreman for the auto show, testified that Paciocco and his crew ended up on a short call on January 7 and that, when Paciocco checked out, Nichols told him he didn’t have the calls for the next day yet and that he would call him back if he had anything. Nichols specifically denied that he had other work for Paciocco that day. Nichols did not remember Paciocco raising any issue with this and he did not remember Paciocco saying anything about filing a grievance or NLRB charge. Nichols specifically denied having any argument with Paciocco that day. Nichols admitted that he did not call Paciocco back to work after January 7 because he was instructed by Sam Tanari not to do so. The reason Tanari gave him had something to do with a phone call. According to Nichols, that was all he knew about it.<sup>10</sup>

The Respondent also called Chris Michelin, its employee who worked the service desk at Cobo Arena during the 2005 auto show. The service desk is where exhibitors or workers go if they need to order materials or labor or to retrieve a key for the Hi-Lo or other issues that come up in the course of work. According to Michelin, it is not unusual for the employees to speak to her during the day. Michelin recalled having a discussion with Paciocco at the service window on January 7 regarding an issue with his paycheck. Michelin confirmed that she told Paciocco

<sup>10</sup> The General Counsel elected not to cross-examine Nichols.

that he needed to see his steward. According to Michelin, Paciocco said the steward was not there and that he really needed an answer to his question. In response to his plea, Michelin looked up the paperwork for the day in question and explained to Paciocco that he was not owed the money he claimed for working through lunch. Michelin testified that Paciocco  
 5 apparently did not like this answer because he became angry, threw his hands in the air, and raised his voice. The more she tried to explain it to him, the angrier he appeared to get. Although she testified that he went on like this for a few minutes, she did not elaborate regarding what he was saying. While this was going on, Gacioch walked by and intervened, telling Paciocco that he had already told him that he was not entitled to the pay he was claiming.  
 10 Gacioch asked Paciocco to leave and he did. According to Michelin, she went back into the office after Paciocco left and told her co-workers what had happened because it was unusual to have somebody yelling at her. As she was telling her story, Fred Tanari came over and asked her what happened so she told him the same thing. Fred Tanari did not testify in this proceeding.<sup>11</sup>

15 Andrea Trudeau, who worked for the Respondent as a receptionist in its office at Cobo hall during the 2005 auto show, also testified for the Respondent. As a receptionist, her primary duty was to answer the phone and take messages from callers. She testified that she answered a call from a man identifying himself as Paciocco on January 7, asking to speak to Bobby  
 20 [Whiting], then Sam [Tanari] or Fred [Tanari]. Because none of them were available, she told the caller she would have to take a message. Trudeau testified that the caller, “didn’t seem to like this.” She then wrote the message he gave her verbatim on a message pad and referred the message to Sam Tanari via two-way radio. The message, as she transcribed it on the form in evidence, was: “saying that he’s going to file a grievance if not called back.” Trudeau wrote the  
 25 time the call came in as 1:47 pm. The message form also contains Paciocco’s name (misspelled as “Picocco”) and his cell-phone number.<sup>12</sup>

Sam Tanari, who testified for the Respondent, testified that he had a telephone conversation with Paciocco on January 7 around 2:00 pm, after receiving the message from  
 30 Trudeau described above. Tanari started the call by asking Paciocco, “what’s your story?” According to Tanari, Paciocco said, “I should be working tomorrow.” Tanari asked Paciocco if Nichols had asked him to come back to work. Paciocco said Nichols laid him off. Tanari then told Paciocco that he would have to wait at home until Nichols called him back to work. Tanari testified that he then asked Paciocco what made him think he would just come in on Saturday,  
 35 which was the next day. Paciocco replied that there were guys working there who had fewer hours than him, guys off the street that were just hired in. According to Tanari, he told Paciocco that the NLRB told the Respondent they could hire who they want, and that’s what they did. He again told Paciocco that he would just have to wait until Nichols called him. Paciocco responded by asking Tanari what Nichols had to do with it. Tanari told him that Nichols was Paciocco’s  
 40 boss. Paciocco questioned how Nichols could be his boss if he worked for the union, to which Tanari replied that Nichols was the General Foreman and Paciocco’s boss, he works for the Union but the Respondent hires him. According to Tanari, he and Paciocco went back and forth regarding the issue of Nichols role as foreman and Union member without getting anywhere. Finally, Tanari told Paciocco that if he wanted to call Paciocco back, he would call him. The  
 45 conversation then ended. Tanari denied that there was any discussion of Paciocco filing a grievance or NLRB charges during this conversation and he denied telling Paciocco that he was fired. Tanari did not speak to Paciocco again after this telephone call.

50 <sup>11</sup> The General Counsel also elected not to cross-examine Michelin.

<sup>12</sup> The General Counsel also elected not to cross-examine Trudeau.

Tanari testified further that, at the time of this conversation, he had not completed the next day's work calls. Tanari explained that part of his job is to walk the floor every day and find out from the exhibitors' representatives how the work was going and how many men in which classifications they would need for the next day. By about noon time, he will sit down and start making out a list of the number of crews each exhibitor was requesting. Tanari then brings the list to Nichols who forms the crews based on his knowledge of the employees' skills and experience. Nichols fills out the hard cards, which he gets from Michelin in blank, writing down the names of the crew members and the time and place they are to report. Nichols or Whiting will then call the crews for work. Tanari testified that the number of crews needed changes every day and sometimes during the course of the day, depending on how the work is progressing. Tanari denied that there was any "first in, first out" practice with respect to the assignment of work. According to Tanari, work assignment could be based on the particular skills need for a particular task, or a request from an exhibitor for a specific crew.

Tanari testified that, after his telephone conversation with Paciocco, he learned about the incident with Michelin over the dispute about Paciocco's pay. After discussing the situation with his father, Sam Tanari decided that night to write a letter to the Union to tell them that he no longer wanted Paciocco working for the Respondent. Tanari testified that he made this decision because of the way Paciocco spoke to Tanari on the phone, the way he treated the Respondent's office staff and because of Paciocco's refusal to recognize Nichols as his boss. Although he acknowledged reading the telephone message taken by Trudeau in which Paciocco threatened to file a grievance if not called back, Tanari denied that this had anything to do with his decision. Tanari also denied that he would take any action against an employee for filing grievances or unfair labor practice charges. In support of this testimony, Tanari cited the fact that many of the individuals who filed the charges that led to the NLRB settlement agreement were selected to be part of the Respondent's 42-man regular crew who would have priority for work calls at Cobo.

Although Sam Tanari testified that he made the decision to write a letter to the Union either on the night of January 7 or the next morning, the letter he wrote, which was placed in evidence by the General Counsel, is dated February 21, six weeks later. No explanation for this discrepancy was offered by the Respondent. Tanari testified that he wrote to the Union, even though under the settlement agreement the Union is not responsible for hiring employees for work at Cobo, because he has a practice of keeping the Union informed of what's happening there. Tanari's letter to the Union, in its entirety, reads as follows:

Convention and Show Services, Inc. (CSS) will not employ Mr. Ron F. Paciocco, Jr. [SSN omitted] on any future jobs with CSS because of his threatening and abusive behavior to our staff.

On January 7, 2005 Mr. Paciocco worked from 7 a.m. to 11 a.m. and was told to go home since the job was complete for the day. The general foreman (GF) would call and let Mr. Paciocco know when to report back to work since we did not have information regarding worker needs for the following day at 11:00 a.m. Instead of waiting for his call, Mr. Paciocco called our office on January 7, 2005 at 1:47 p.m. threatening to file a grievance if he was not called back to work. When the GF determined how many men were needed for the next day, he determined that Mr. Paciocco would have been called in for Saturday, January 8, 2005. Mr. Paciocco was not called in due to his bad behavior.

As an employer, CSS will not accept this type of behavior by any of its employees. Employees cannot dictate when they will work and threaten legal or grievance



repercussions because the company's scheduling does not agree with their wishes. Mr. Paciocco was not recalled to work after January 7, 2005 and CSS will not accept Mr. Paciocco as an employee any time in the future.

5 Your immediate attention and cooperation in this matter is greatly appreciated.

In addition to the witnesses involved in the events of January 7 at Cobo Hall, the Respondent called the Union's business agent, Kwapisz, who contradicted Paciocco's testimony that he went to the Union hall after leaving Cobo on January 7. Although Kwapisz did  
10 recall Paciocco meeting with him about filing a grievance against the Respondent, he believed this occurred during the 2004 auto show, not in 2005. Kwapisz also believed this occurred at a time when the Union was still making referrals through the exclusive hiring hall, which would pre-date the settlement agreement. Kwapisz recalled telling Paciocco that casual employees did not have a right to file a grievance under the collective bargaining agreement. According to  
15 Kwapisz, casuals are excluded from the grievance procedure under both the National Master Freight Agreement (NMFA), which was in effect at COBO in 2004, and under the new, separate collective bargaining agreement negotiated by the Union with the Respondent that became effective when signed by the parties on January 6.<sup>13</sup>

20 In addition to the above witnesses called by the parties who were directly involved in the events encompassed by the allegations regarding Paciocco's termination and/or failure to recall, the General Counsel called John Dana Fedricks as a witness. Fedricks had no involvement in the events of January 7, or in the Respondent's decision not to employ Paciocco after that date. Rather, Fedricks testified regarding a conversation he had with Sam Tanari in a bar near Cobo  
25 Hall on the night of January 28, as Tanari and the employees were celebrating the end of the 2005 auto show. Fedricks has worked for the Respondent since it was founded in 1982, has been a member of the Union since 1988 and is part of the 42-man regular crew established after the settlement agreement. Fedricks was one of the Charging Parties in the previous unfair labor practice charges that were resolved in 2004.

30 Fedricks testified that he was in the bar with Mike Stezlick, another employee from the auto show, when Sam Tanari sat down next to him. After some initial small talk, Fedricks asked Tanari why he was the last person called in to work on the auto show. According to Fedricks, Tanari replied, "it's because of your involvement with the NLRB. You encourage people to  
35 sue...everything that came across his desk had Fedrick's name on it." When Fedricks asked who Tanari was talking about in terms of Fedricks encouraging people to sue, Tanari cited several individuals by name. Fedricks recalled that Tanari also said that Fedricks had cost the Respondent \$150,000 in profit off the top by his actions. Fedricks responded by denying that he had encouraged anyone to sue, telling Tanari that he didn't even know the people Tanari cited.  
40 Fedricks did not recall anything else from this conversation other than that he and Tanari went back and forth, hashing over different issues. Fedricks also recalled that Stezlick tried to act as a mediator between the two, suggesting at one point that Fedricks have a meeting to resolve these issues.<sup>14</sup> The conversation ended with Sam Tanari telling Fedricks that he should meet with his father, Fred, to get things squared up. Fedrick's testified that after this conversation, he  
45 approached Fred Tanari about having a meeting but that Fred refused to discuss it with him, telling Fedricks he might use anything he said against him. When Fedricks protested that the

<sup>13</sup> The NMFA is not in evidence. The new agreement, at Article 7.2, provides that "issues concerning discipline, discharge, hiring or job referrals for Casual Exposition Workers shall not  
50 be subject to the grievance procedure set forth in this Agreement."

<sup>14</sup> Stezlick was not called as a witness in this proceeding.

Respondent was bringing in people with no experience ahead of him after all the years he worked there, Fred Tanari replied that the NLRB made the Respondent bring in new people with no experience, an obvious reference to the settlement agreement.

5 On cross-examination, Respondent elicited testimony that Fedricks filed a charge against the Respondent on February 14, not long after this conversation, which alleged on its face that the Respondent had violated Section 8(a)(1), (3) and (4) of the Act by failing and refusing to hire him to work on the 2005 Auto Show. Fedricks admitted that this allegation was not true when he signed the charge form, since in fact he had worked for the Respondent during 10 the 2005 show. Fedricks explained that a Board agent had prepared the charge for him in November, to use in the event he had problems with the Respondent as a result of his involvement with the settled charges. In filing this charge, Fedricks intended to allege that it was the delay in calling him for work, after calling in others who had not been involved in the prior unfair labor practice charges, that violated the Act. He in fact wrote a statement to this effect 15 which he submitted with the charge when he filed it. Fedricks testified that in filing the charge in this manner, he relied upon the advice of the Board agent who had prepared the charge initially.<sup>15</sup> The charge that Fedricks filed did not result in issuance of a complaint. The conversation that Fedricks allegedly had with Sam Tanari on January 28 was first reported by him in the affidavit he gave to the Region in support of that charge.

20 Sam Tanari testified that he did have a conversation with Fedricks on or about January 28 in the bar. However, he disputed Fedrick's version. According to Tanari, Fedricks asked him why he wasn't one of the first guys called to work the auto show. Tanari told Fedricks that now that the Respondent can pick who it wants to work there, they were going to change things 25 around, that the Respondent would no longer hire strictly by seniority the way it had done for years through the Union. Tanari told Fedricks that the way they had been hiring is what got them into trouble with the NLRB in the first place and they had to change things. Tanari specifically denied telling Fedricks that he wasn't hired because he had filed charges with the NLRB. According to Tanari, he said just the opposite, i.e., that the Respondent would not hold 30 anything against him because of the NLRB actions.

As noted above, there is no dispute that the Respondent made a conscious decision not to employ Paciocco after January 7 and that this decision was based on what happened that day. The General Counsel claims that this decision violated Section 8(a)(1), (3) and (4) of the 35 Act because Paciocco was engaged in protected activity when he told Nichols and Tanari that he would file a grievance and NLRB complaint over Nichols' failure to assign him additional work when Paciocco and his crew checked out on January 7.<sup>16</sup> The General Counsel relies primarily on the testimony of Paciocco to support this allegation. In addition, the General Counsel cites Tanari's February 1 letter to the Union as proof that Paciocco's intent to pursue a 40 grievance and unfair labor practice charge were a motivating factor in the decision. The Respondent counters by challenging the credibility of Paciocco and relying upon the testimony of Tanari to establish a lawful basis for the Respondent's decision.

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45 <sup>15</sup> The Respondent cited this situation, as well as others, in a formal complaint it filed with the General Counsel's office over the Region's handling of charges involving the Respondent. The issues raised in the Respondent's letter are not for me to resolve.

50 <sup>16</sup> The General Counsel did not claim that the Respondent's actions were unlawful because motivated by Paciocco's pursuit of the dispute over his paycheck. Paciocco made clear in his testimony that the grievance and NLRB complaint he intended to pursue were based on Nichols' failure to give him additional work, not the shortage in pay.

In *Wright Line*,<sup>17</sup> the Board held that, in cases where employer motivation is the issue, the General Counsel must first establish, by a preponderance of the evidence, that union or protected concerted activity was a “motivating factor” in the decision to discharge an employee. In order to meet his initial burden, the General Counsel must show that the employee was engaged in protected activity, that the employer was aware of this activity and that the employer exhibited animus against such activity. The Board has approved reliance upon circumstantial evidence to establish elements such as knowledge and animus, acknowledging the reality that direct proof of motivation will seldom be available. *Naomi Knitting Plant*, 328 NLRB 1279 (1999); *Abbey’s Transportation Services*, 284 NLRB 698, 701 (1987), *enfd.* 837 F.2d 575 (2d Cir. 1988). Only if the General Counsel has made the requisite showing will the burden shift to the Respondent to “demonstrate [by a preponderance of the evidence] that the same action would have been taken even in the absence of the protected conduct.” *Id.* See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). Where an employer asserts, as here, that some type of employee misconduct was the reason for discharge, the employer “does not need to prove that the employee *actually* committed the alleged offense. It must show, however, that it had a *reasonable belief* the employee committed the offense, and that the employer acted on that belief in taking the adverse action against the employee.” *Midnight Rose Hotel & Casino*, 343 NLRB No. 107 (December 16, 2004). The Board applies this same standard to allegations under Section 8(a)(4) of the Act. *McKesson Drug Co.*, 337 NLRB 935, 936 (2002) and cases cited therein.

Initially, I find that the Section 8(a)(4) allegation in the complaint is not supported by any credible evidence in the record. The only evidence that Paciocco informed the Respondent of his intent to file a complaint with the NLRB is his uncorroborated testimony. I found this portion of his testimony unbelievable. Paciocco did not in fact file any unfair labor practice charges with the Board for almost six months after he allegedly announced his intent to do so. When he did finally file a charge, he made no mention of this alleged basis for his termination. It defies logic that someone who was upset enough about the Respondent’s failure to offer him work that he would threaten to take the Respondent to the NLRB would wait six months to do so. His delay in pursuing charges is in sharp contrast with the way he acted in carrying out his threat to file a grievance. According to Paciocco, after his argument with Nichols over not getting the next hard card, which ended with Paciocco telling Nichols that he was going to file a grievance with the Union, Paciocco went immediately to the Union hall and met with the business agent about filing a grievance. If, as Paciocco claims, Kwapisz told him he had no right to pursue a grievance under the collective bargaining agreement, why didn’t he immediately go to the NLRB and pursue his announced intention to file a complaint in that forum? The only explanation for this inconsistent conduct is that the idea of filing a charge with the NLRB arose at a later time, long after the events of January 7. Because I do not credit Paciocco’s testimony in this regard, I must recommend dismissal of the allegation that the Respondent violated Section 8(a)(1) and (4) in its treatment of Paciocco.<sup>18</sup>

The allegation that Respondent’s actions were motivated by Paciocco’s threat to file a grievance is more difficult to resolve. My finding as to the credibility of Paciocco’s testimony concerning the filing of a complaint with the NLRB casts doubt on his overall credibility regarding the discussions he claimed to have had with Nichols and Tanari on January 7. The fact that he chose to embellish these conversations by making a belated claim that he not only

<sup>17</sup> 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1<sup>st</sup> Cir. 1981).

<sup>18</sup> Based on this finding, I need not address the Respondent’s affirmative defense that the Section 8(a)(1) and (4) allegation in the complaint is barred by Section 10(b) of the Act because not included in a charge filed within six months of the alleged unfair labor practice.

mentioned a grievance but also a NLRB charge in pursuit of additional work opportunities makes his testimony regarding the rest of the events that day unreliable. In this light, Gacioch's and Nichols' testimony that Paciocco did not say anything about filing a grievance is more believable.

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I also note that Toth, the only witness in this proceeding in a position to corroborate any of Paciocco's testimony that would support the allegations of the complaint, did not do so. Under Paciocco's version of events, Toth would have been present when Paciocco claims he saw Nichols pick up a hard card from Michelin. Toth would also have been present when Paciocco and his crew followed Nichols into the office to check out, which is when he claimed to have seen Nichols put the same hard card face down on the desk. Finally, Toth was also present when the crew walked out of the office and Paciocco told Toth and Tone that he wanted to hang around to see what happened when the next crew checked out. The fact that Toth did not testify that any of these things happened is fatal to Paciocco's credibility.

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Because of my doubts about Paciocco's overall credibility, I cannot find, as he claims, that there was an issue regarding a hard card that Nichols assigned to another crew or that he had an argument with Nichols over the assignment of this hard card. Instead, I credit Nichols testimony that there was no more work for Paciocco and his crew that day and that he told them to go home and wait for a call. I find, based on the more credible testimony of Gacioch and Michelin, that the only issue Paciocco had, before leaving Cobo Hall on January 7, was his belief that he had been shorted in his paycheck. I also find that, in pursuing this issue with Michelin, he became somewhat agitated, raising his voice and gesturing enough to attract the attention of Gacioch and to cause Michelin to comment about it to her co-workers. The General Counsel does not allege that Paciocco's actions in pursuing the complaint about his paycheck were concerted activity protected by the Act or that the Respondent's decision to terminate Paciocco's employment was motivated by this activity.

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Although I have found that Paciocco did not say anything about filing a grievance or pursuing charges with the NLRB before leaving Cobo hall on January 7, there is no dispute that he did make such a statement later that day when he called and left the telephone message with Trudeau. Apparently not patient to wait at home until Nichols called him about further work availability, Paciocco decided to try to ensure he got work by threatening to pursue a grievance if he was not called. I find that it was in response to this message that Tanari called Paciocco on January 7. I do not credit Paciocco's testimony that he called Nichols and that Tanari got on the phone. Nor do I credit Paciocco's version of the conversation. Instead, I find that Tanari's version of the conversation is the more accurate version. In this conversation, Paciocco was seeking to ensure that he was called into work the next day. When Tanari told Paciocco that he would have to wait for Nichols to make the call, Paciocco became argumentative and questioned Nichols' authority as the Respondent's foreman. In pursuing this issue with the Respondent, Paciocco was clearly acting in his own interests and not on behalf of other employees. His activity was thus not concerted.

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Although I have discredited Paciocco's version of the events of January 7, I nevertheless must find that the Respondent's decision to no longer employ Paciocco on the auto show was motivated, at least in part, by Paciocco's telephonic message threatening to file a grievance if he was not called back. Tanari's denial that this had anything to do with the decision is belied by the letter he wrote to the Union on February 21. That letter, drafted close in time to the decision and at a time when no unfair labor practice was pending, is the most direct evidence of the Respondent's motivation in the record. In that letter, Tanari states that Paciocco's "threatening and abusive behavior toward the Respondent's staff" is the reason that the Respondent could no longer employ Paciocco. Although the evidence establishes that Paciocco was

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argumentative in dealing with Michelin over his pay dispute, Tanari did not mention this in his letter. The only specific “behavior” cited in the letter is the telephone message Paciocco left with Trudeau “threatening to file a grievance if he were not called back to work.” Tanari then admits that, but for this behavior, Paciocco would have been called for work the next day by Nichols. At the end of his letter, Tanari advised the Union he would not accept “this type of behavior” which he again describes specifically as “threatening legal or grievance repercussions” if an employee does not get the work assignment he desires. A clear reading of this letter leads to the conclusion that Paciocco’s telephone message was a motivating factor in Tanari’s decision. The question remains whether Paciocco’s reference to filing a grievance in that telephone message was protected activity.

Counsel for the General Counsel argues that Paciocco’s statement of his intent to file a grievance, by itself, amounts to “union activity” protected by Section 7 of the Act.<sup>19</sup> See *E.A. Nord Co.*, 250 NLRB 403, 407 (1980); *Keokuk Gas Service Co.*, 233 NLRB 496, 505 (1977), enf. 580 F.2d 328 (8<sup>th</sup> Cir. 1978); *Price Brothers Company*, 175 NLRB 277, 278 (1969), enf. denied 422 F.2d 452 (6<sup>th</sup> Cir. 1970). The Respondent, while acknowledging that an employee has the right to file a grievance when he “honestly and reasonably believes” that his rights have been violated, argues that Paciocco could not have had such a belief because he was aware at the time he telephoned the Respondent’s office that, as a casual employee, he did not have a right to grieve work assignment and hiring decisions. In the Respondent’s view of the facts, Paciocco had no interest or intention to file a grievance but was attempting to blackmail the Respondent into giving him work.

Paciocco’s own testimony, as well as the preponderance of the evidence, establishes that Paciocco had in fact met with the Union before speaking to Tanari and, in all likelihood, before leaving the telephone message cited by Tanari in his letter. Paciocco claimed that he went to the Union hall directly from Cobo Hall on January 7, before he tried to call Nichols. Kwapisz testified, contrary to Paciocco, that he met with Paciocco a year earlier to discuss the filing of a grievance. Although Kwapisz’ recollection of this conversation was vague, it is not necessary for me to credit Kwapisz to find that Paciocco was aware that he had no right to file a grievance when he called the Respondent. I make this finding based on Paciocco’s own timeline of events on January 7. Moreover, I note that Paciocco must have known he could not file a grievance over Nichols’ failure to call him back to work because, even after he claims that Tanari told him that the Respondent would not call him “because he was causing too many problems”, Paciocco did not attempt to file a grievance. In fact, he took no action in pursuit of his “contractual rights” for almost six months.

In an effort to bolster its case and lend some support to Paciocco’s testimony, General Counsel called Dana Fedricks as a witness to testify about a wholly unrelated conversation that occurred almost two months after Tanari’s decision not to employ Paciocco any longer. Even under the version described by Fedricks, Tanari said nothing in this conversation about Paciocco. According to Fedricks, Tanari essentially admitted to him that he did not call Fedricks to work at the auto show as early as Fedricks expected because Fedricks had filed charges with the Board. Tanari denied making such a bald-faced admission of unlawful conduct. Although

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<sup>19</sup> General Counsel has not argued that Paciocco’s invocation of the grievance procedure was protected concerted activity under the *Interboro* doctrine. *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enf. 388 F.2d 495 (2d Cir. 1967) (an employee’s “honest and reasonable” efforts to enforce rights under a collective bargaining agreement is protected concerted activity even if the employee is acting alone). See also *NLRB v. City Disposal, Inc.*, 465 U.S. 822, 840 (1984).

there was nothing in Fedricks' demeanor that would suggest he was fabricating this testimony, I find it unlikely that the conversation occurred as he described.<sup>20</sup> In making this finding, I note that the General Counsel failed to call a witness, Mike Stezlick, who was in a position to corroborate Fedricks. I also note that the conversation occurred in a bar when the participants had been drinking. Moreover, Fedricks relied upon this statement in support of a charge he filed shortly thereafter suggesting he had an interest in shading the truth to support the claim he was making in that charge. Finally, one must wonder why, if Tanari had made such a statement, the General Counsel did not issue a complaint based on Fedricks' charge of retaliation for having filed charges with the Board.

Based on the above, and the preponderance of the evidence, I find that the General Counsel has not met his burden of proving that the Respondent terminated and/or failed to re-call Paciocco to work because he engaged in union and other protected concerted activities or because he announced his intention to file charges with the NLRB. Accordingly, I shall recommend that the complaint be dismissed in its entirety.

#### Conclusions of Law

Respondent did not engage in any unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3) and (4) and Section 2(6) and (7) of the Act when it terminated and/or failed to call Renato Paciocco, Jr. for work at the Detroit International Auto Show on and after January 7, 2005.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>21</sup>

#### ORDER

The complaint is dismissed.

Dated, Washington, D.C. , February 8, 2006.

Michael A. Marcionese  
Administrative Law Judge

<sup>20</sup> In assessing Fedricks' credibility, I attach no weight to the fact that he admittedly filed a charge with the Board that he knew was false on its face. In doing so, Fedricks relied upon advice he received from a Board agent and attempted to correct the inaccuracy by submitting a contemporaneous statement explaining the true basis for his charge.

<sup>21</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.